U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 March 2006

BALCA Case No.: **2005-INA-00031**
ETA Case No.: P2002-CA-09534238/JS

In the Matter of

SAV-ON APPLIANCE,
Employer,

on behalf of

ANTONIO CARRILLO,
Alien.

Appearance: Emmett Julian
Burbank, California
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

BEFORE: **Burke, Chapman, and Vittone**[1]
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of a Home Appliance Repairer.[2] The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

[2] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the

STATEMENT OF THE CASE

In 2001, Employer filed an application for permanent labor certification to enable the Alien to fill its position for an Appliance Repairer. (AF 23-24). The CO issued a Notice of Findings on January 25, 2004, proposing to deny labor certification because, *inter alia,* one U.S. worker applicant ("U.S. Applicant"), although apparently qualified, was never interviewed because the certified letter inviting him to interview was not mailed by Employer until two days before the scheduled interview date and was not received by the applicant until five days after the interview date. Additionally, the CO found that the letter did not include a telephone number or invite the U.S. Applicant to reschedule the interview. The CO concluded that Employer had not made a good-faith effort to recruit this U.S. worker in violation of 20 C.F.R. § 656.21(b)(6). (AF 19-21). For corrective action, Employer was instructed to document that it made a good-faith effort to recruit the U.S. Applicant and that he had been rejected solely for lawful, job-related reasons. (AF 21).

In its rebuttal filed January 27, 2004, Employer blamed the delay in delivering the interview notice to the U.S. Applicant on the postal service and apologized for not attempting to contact the U.S. Applicant to reschedule his appointment. Employer offered to reschedule an appointment with the U.S. Applicant if he was still interested in the position. (AF 9).

The CO thereafter issued a Final Determination on February 23, 2004, denying labor certification on the basis that Employer failed to demonstrate that it had made a good-faith effort to recruit a qualified U.S. worker. More specifically, the CO stated as follows:

> Whereas the applicant is [sic] resume qualified, the employer was obligated to contact and attempt to recruit him as soon as possible. The employer sent the letter only two days before the interview date, included no telephone number or invitation to reschedule, and made no other attempt to contact the applicant. The employer was on notice concerning the late date that his letter was received even before forwarding the recruitment results to the local office. At this time, there is

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Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

> no provision to recruit again the same applicant that may have been available at the time of the recruitment period. Based on all information available, we cannot find that the employer has made sufficient effort to recruit this applicant. Accordingly, we find that the employer remains in violation of 20 CFR [§] 656.21(b)(6), and the application is denied.

(AF 7B).

Employer acknowledges in its March 17, 2004 appeal request that it made a mistake in not putting its phone number on the invitation letter and in not attempting to reschedule an appointment with the U.S. Applicant. However, Employer disagreed with the finding that it was notified of the late arrival of the invitation letter before it forwarded the recruitment results to the local office. In this regard, Employer explained as follows:

> Unfortunately, during the time of recruitment all correspondence would go through my secretary, I was not aware that the letter to [the U.S. Applicant] was received late until I was going to submit the recruitment results to your office. Since then I have made it so ALL correspondence that arrives to my company goes directly to me. Again, I apologize for all of the inappropriate actions. I ask you to please reconsider your decision to deny the above mentioned case. Thank you in advance for your attention.

(AF 2).

DISCUSSION

The issue in the instant case involves the sufficiency of the evidence concerning whether Employer made a good-faith effort to recruit a qualified U.S. worker. The burden of proof regarding this issue is on the Employer. *See Cathay Carpet Mills, Inc.,* 1987-INA-161 (Dec. 7, 1988) (*en banc*). An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good-faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.* 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good-faith recruitment are grounds for denial. 20 C.F.R. §§ 656.1, 656.2(c).

Employer acknowledges that it erred in its recruitment of the U.S. Applicant by not including its phone number on the invitation letter and in not attempting to reschedule an

appointment to interview him. (AF 2). Employer apologized for its actions and requested reconsideration of the decision to deny alien labor certification in this matter. (AF 2).

After careful review of the record, it is clear that the evidence does not support a good-faith effort to recruit U.S. workers for this position on the part of Employer. As explained by the CO in the Final Determination dated February 23, 2004, the letter scheduling the job interview for the U.S. Applicant was not postmarked until September 11, 2002—two day before his September 13, 2002 interview date, and was not received by him until September 18, 2002, five days after his interview date. (AF 49, 65, 66). Moreover, the letter was sent by certified mail, meaning that the U.S. Applicant or someone at his household needed to be present to sign the receipt before delivery could occur. Accordingly, Employer could not reasonably have expected that the invitation letter would arrive before the U.S. Applicant's scheduled interview. In fact, the record confirms that it was not delivered to the U.S. Applicant until five days after the interview date and supports the conclusion of the CO that receipt of the letter five days after the interview date would have discouraged the applicant from attempting to pursue the job. (AF 20, 49, 66). Additionally, the CO recognized that the invitation letter did not include a telephone number for Employer and did not invite the applicant to reschedule the interview if the letter was received late.

Employer apologized for these errors and asked for the opportunity to rectify them by interviewing the applicant if he was still interested in the position. (AF 9). However, the CO correctly determined that there was no provision that would allow an employer to again recruit the same applicant who was available during the initial recruitment period. (AF 7B). Instead, 20 C.F.R. § 656.21(b)(6) requires that if U.S. workers have applied for the job opportunity, then the employer must document that they were rejected solely for lawful job-related reasons. Employer's admission of its errors in recruiting the U.S. Applicant and its stated willingness to again recruit him does not negate the fact that Employer sent him an invitation to interview that could not possibly have arrived in a timely manner and which prevented a potentially qualified U.S. worker from applying for this position. (AF 4). The failure of Employer to timely send the invitation for the job interview to the U.S. Applicant, coupled with Employer's failure to include its telephone number on the invitation or give the applicant a timely opportunity to reschedule

the job interview, indicates a lack of good-faith recruitment. Moreover, this evidence confirms that the applicant, a U.S. worker, was not rejected for this position solely for lawful, job-related reasons.

ORDER

The Final Determination of the Certifying Officer denying labor certification is **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.